UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RICHARD WEDDLE,

Plaintiff,

v.

ISIDRO BACA, *et al.*,

Defendants.

3:16-cv-00634-MMD-CBC

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

This case involves a civil rights action filed by Plaintiff Richard Weddle ("Weddle") against Defendants Isidro Baca, David Carpenter, Jason O'Dea, Pamela Feil, Robert LeGrand, Bobby Preston, and Brian Williams (collectively referred to as "Defendants"). Currently pending before the Court is a partial motion for summary judgment filed by Defendants which asserts Counts II through VII in the amendment complaint should be dismissed. (ECF No. 24.) Weddle opposed (ECF No. 44), and Defendants replied. (ECF No. 45). Having thoroughly reviewed the record and papers, the Court recommends Defendants' motion partial motion for summary judgment be granted in part, and denied in part.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Procedural History

Weddle is an inmate in the custody of the Nevada Department of Corrections ("NDOC"), and is currently housed at High Desert State Prison ("HDSP") in Indian Springs, Nevada. (ECF No. 10.) However, the events giving rise to this case took place at Lovelock Correctional Center ("LCC"). (*Id.*) On November 4, 2016, Weddle submitted

his initial complaint and motions. (ECF No. 1-1.) The initial complaint was never screened. However, on August 28, 2017 Weddle submitted an amended civil rights complaint pursuant to 42 U.S.C. §1983, together with an application to proceed in forma pauperis. (ECF No. 10.) In the complaint, Weddle asserted eight claims for relief against Defendants. (*Id.* at 4-32.) Weddle sought injunctive and monetary relief. (*Id.* at 33.)

Pursuant to 28 U.S.C. § 1915A(a), the Court screened Weddle's complaint on September 26, 2017. (ECF No. 11.) The Court determined that several of Weddle's claims could proceed. The partial motion for summary judgment currently before the Court seeks dismissal of some, but not all, of those claims. (ECF No. 24.)

B. Factual Background

Each of Weddle's claims arise out the issuance of a disciplinary charge against him in September 2014 by the LCC law librarian, and the events that followed. (ECF No. 10). Generally, Weddle alleges his civil rights were violated because the disciplinary charge was false and fabricated, various LCC staff (who are named defendants) knew the charge was false. In spite of this, the disciplinary charge was allowed proceed and various LCC staff failed to take actions that would have resulted in the charge being dismissed. (*See id.*)

The alleged events giving rise to his claims are as follows. Weddle claims that on September 5, 2014, he was in the law library at LCC and he initiated a grievance pursuant to the prison policies. (*Id.* at 7.) Defendant Feil, the law librarian at LCC, retaliated against him for initiating this grievance by filing a false disciplinary charge against him for a Major Violation 25 ("MJ 25"), for threatening staff. (*Id.* at 7-8, 10.) After the disciplinary charge was issued, Weddle was ultimately taken to administrative segregation by Defendant O'Dea, who is a corrections officer at LCC. (*Id.* at 9). Although O'Dea allegedly knew the disciplinary charge was false and fabricated, he still placed him in administrative segregation. (*Id.*)

A preliminary disciplinary hearing was held on the MJ 25 violation on September 10, 2014. (*Id.* at 13.) This hearing was conducted by Defendant Preston, the Preliminary

Disciplinary Hearing officer, who failed to review videotape from the alleged incident and refused to allow Weddle to call any witnesses. If the videotape or witnesses had been presented, it would have verified that he did not threaten Feil and thus the disciplinary charge was false. (*Id.*) However, his case proceeded to a disciplinary hearing.

The disciplinary hearing was held on October 5 and 6, 2014, This hearing was conducted by the Disciplinary Hearing Officer, Defendant Carpenter, who also failed to review the videotape or allow witnesses to be presented. (*Id.* at 14-15.) Ultimately, Carpenter found Weddle guilty of a reduced charge – a General Violation 9 ("GV 9"), for use of abusive language. (*Id.* at 17-18.) Based on this finding, Defendant Carpenter sanctioned Weddle to fifteen days in disciplinary segregation.

Following these proceedings, Weddle filed an administrative appeal to the warden at LCC. (*Id.* at 24.) In the appeal, Weddle argued Defendant Carpenter failed to follow the proper prison policies in conducting the hearing by failing to review the videotape or allow him to present witnesses. (*Id.* at 28.) After reviewing the appeal, Defendant LeGrand upheld the Defendant Carpenter's decision and the sanction against Weddle.

Weddle then sought a second level appeal of Defendant LeGrand's decision to LCC Warden, Defendant Baca, who agreed with LeGrand. (*Id.* at 28-29.) Ultimately, Weddle sought to have this disciplinary conviction expunged from his record by Defendant Williams, the Warden at HDSP, who refused to do so. (*Id.* at 31, 33).

Based on these facts, Weddle alleges violations of his Fourteenth Amendment right to due Process rights against Defendants Preston and Carpenter in Counts II and III. In Counts IV and V, Weddle alleges that LeGrand and Baca, respectively, are liable under theories of supervisory liability for the Due Process violations asserted against their employees. In Count VI, Weddle alleges a state law negligence claim against Feil, Carpenter and O'Dea. Finally, in Count VII, Weddle alleges that Williams, a warden at HSDP, in his official capacity only, failed to expunge Weddle's record of the disciplinary conviction in violation of his due process rights. Weddle seeks injunctive and monetary relief against Williams as a result.

C. Defendants' Motion for Summary Judgment

On April 24, 2018, Defendants filed a partial motion for summary judgment seeking dismissal of Counts II through VII. (ECF No. 24.) Specifically, Defendants argue: (1) Counts II and III should be dismissed because Weddle did not have a protected liberty interest since he did not receive any punishment at the preliminary disciplinary hearing, and at the disciplinary hearing he was given a sanction of fifteen (15) days in disciplinary segregation, his sentence was not increased, and he did not lose any good-time credits which does not amount to an atypical hardship; (2) Counts IV and V should be dismissed because there is no supervisory liability since there was no underlying due process violation at either the preliminary disciplinary hearing or the disciplinary hearing, and, in the alternative, even if there was a due process violation because LeGrand and Baca were not deliberately indifferent; (3) Count VI should be dismissed because it is barred by sovereign immunity since Weddle failed to properly name the State of Nevada on relation of the NDOC, as required by Nevada Revised Statutes (NRS) 41.031 and 41.0337; and, (4) Count VII should be dismissed as to Weddle's request for money damages because it is barred by sovereign immunity since Williams is being sued only in his official capacity. (ECF No. 24 at 1-27.) In the alternative, Defendants argue that Feil, Carpenter, LeGrand, Preston, O'Dea and Baca are entitled to qualified immunity. (*Id.*)

Weddle opposed the motion (ECF No. 44), and Defendants replied. (ECF No. 45). The recommended disposition follows.

II. LEGAL STANDARD

Summary judgment allows the court to avoid unnecessary trials. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). The court properly grants summary judgment when the record demonstrates that "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the

suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). A dispute is "genuine" only where a reasonable jury could find for the nonmoving party. *Id.* Conclusory statements, speculative opinions, pleading allegations, or other assertions uncorroborated by facts are insufficient to establish a genuine dispute. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081–82 (9th Cir. 1996). At this stage, the court's role is to verify that reasonable minds could differ when interpreting the record; the court does not weigh the evidence or determine its truth. *Schmidt v. Contra Costa Cnty.*, 693 F.3d 1122, 1132 (9th Cir. 2012); *Nw. Motorcycle Ass'n*, 18 F.3d at 1472.

Summary judgment proceeds in burden-shifting steps. A moving party who does not bear the burden of proof at trial "must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element" to support its case. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Ultimately, the moving party must demonstrate, on the basis of authenticated evidence, that the record forecloses the possibility of a reasonable jury finding in favor of the nonmoving party as to disputed material facts. *Celotex*, 477 U.S. at 323; *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). The court views all evidence and any inferences arising therefrom in the light most favorable to the nonmoving party. *Colwell v. Bannister*, 763 F.3d 1060, 1065 (9th Cir. 2014).

Where the moving party meets its burden, the burden shifts to the nonmoving party to "designate specific facts demonstrating the existence of genuine issues for trial." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citation omitted). "This burden is not a light one," and requires the nonmoving party to "show more than the mere existence of a scintilla of evidence. . . . In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the

non-moving party's favor." *Id.* (citations omitted). The nonmoving party may defeat the summary judgment motion only by setting forth specific facts that illustrate a genuine dispute requiring a factfinder's resolution. *Liberty Lobby*, 477 U.S. at 248; *Celotex*, 477 U.S. at 324. Although the nonmoving party need not produce authenticated evidence, Fed. R. Civ. P. 56(c), mere assertions, pleading allegations, and "metaphysical doubt as to the material facts" will not defeat a properly-supported and meritorious summary judgment motion, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986).

For purposes of opposing summary judgment, the contentions offered by a *pro se* litigant in motions and pleadings are admissible to the extent that the contents are based on personal knowledge and set forth facts that would be admissible into evidence and the litigant attested under penalty of perjury that they were true and correct. *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004).

III. DISCUSSION

A. Civil Rights Claims under Section 1983

42 U.S.C. § 1983 aims "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights." *Anderson v. Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000)). The statute "provides a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights[,]" *Conn v. Gabbert*, 526 U.S. 286, 290 (1999), and therefore "serves as the procedural device for enforcing substantive provisions of the Constitution and federal statutes," *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). Claims under section 1983 require a plaintiff to allege (1) the violation of a federally-protected right by (2) a person or official acting under the color of state law. *Warner*, 451 F.3d at 1067. Further, to prevail on a § 1983 claim, the plaintiff must establish each of the elements required to prove an infringement of the underlying constitutional or statutory right.

B. Analysis

1. Section 1983 Due Process Claims

Counts II and III arise out of Weddle's assertions that his right to procedural due process pursuant to the Fourteenth Amendment was violated in the preliminary and disciplinary hearings. The Fourteenth Amendment guarantees all citizens, including inmates, due process of law. However, only certain interests receive the guarantees of due process; an inmate's right to procedural due process arises only when a constitutionally protected liberty or property interest is at stake. *Wilkinson v. Austin*, 545 U.S. 209, 221, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005). Therefore, courts analyze procedural due process claims in two parts. First, the court must determine whether the plaintiff possessed a constitutionally protected interest. *Brown v. Ore. Dep't of Corr.*, 751 F.3d 983, 987 (9th Cir. 2014). Second, and if so, the court must compare the required level of due process with the procedures the defendant observed. *Id.* A claim lies only where the plaintiff has a protected interest, and defendants' procedure was constitutionally inadequate. *Id.*

Under the Due Process Clause, an inmate does not have liberty interest related to prison officials' actions that fall within "the normal limits or range of custody which the conviction has authorized for the State to impose." *Sandin v. Conner*, 515 U.S. 472, 478, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995) (citing *Meachum v. Fano*, 427 U.S. 215, 225, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976)). The Clause contains no embedded right of an inmate to remain in a prison's general population. *Id.* at 485-86. Further, "the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence." *Hewitt v. Helms*, 459 U.S. 460, 468, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983), *overruled on other grounds by Sandin*, 515 U.S. at 472-73. "Thus, the hardship associated with administrative segregation, such as loss of recreational and rehabilitative programs or confinement to one's cell for a lengthy period of time, does

not violate the due process clause because there is no liberty interest in remaining in the general population." *Anderson v. Cnty. Of Kern*, 45 F.3d 130, 1315 (9th Cir. 1995).

State law also may create liberty interests protected under the Due Process Clause but "these interests will generally be limited to freedom from restraints which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 483-84. As the Ninth Circuit later observed, "*Sandin* and its progeny made this much clear: to find a violation of a state-created liberty interest the hardship imposed on the prisoner must be 'atypical and significant . . . in relation to the ordinary incidents of prison life.'" *Chappell v. Mandeville*, 706 F.3d 1052, 1064 (9th Cir. 2013) (quoting *Sandin*, 515 U.S. at 483-84). Thus, under *Sandin*, Weddle may show a protected liberty interest not by reference to the procedural shortcomings of his disciplinary hearings, but instead by demonstrating that the disciplinary segregation to which was he subjected rises to the level of "atypical and significant hardship." *See id.*

When conducting the "atypical and significant hardship" inquiry, courts examine a "combination of conditions or factors . . ." *Kennan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996). These conditions include: (1) the extent of difference between segregation and general population; (2) "the duration and intensity of the conditions confinement;" and, (3) whether the sanction extends the length of the prisoner's sentence. *See Serrano v. Francis*, 345 F.3d 1071, 1078 (9th Cir. 2003) (citing and discussing *Sandin*, 515 U.S. at 486-87); *Chappell*, 706 F.3d at 1064-65.

On several occasions, courts have applied the *Sandin* factors to segregated confinement. The weight of authority supports the contention that segregated housing is rarely sufficiently severe to create a liberty interest. *Deeds v. Cox*, 2016 U.S. Dist. LEXIS 110067, 2016 WL 4425097, at *11-12 (D. Nev. June 28, 2016); *Machlan v. Neven*, 2015 U.S. Dist. LEXIS 39491, 2015 WL 1412748, at *15 (D. Nev. Feb. 17, 2015). Indeed, the Ninth Circuit has stated that "administrative segregation in and of itself does not implicate a protected liberty interest." *Serrano*, 345 F.3d at 1078. As to

disciplinary segregation, the Ninth Circuit has remarked that "it would be difficult . . . to make discilinary segregation sufficiently more restrictive than the conditions of general population . . . to count as an atypical and significant deprivation of liberty . . ." *Id.* Only where the terms of confinement are extreme have most courts found that liberty interests might arise. *See, e.g., Wilkinson*, 545 U.S. at 224 (concluding that an atypical and significant hardship existed where "almost all human contact [was] prohibited," lights were kept on twenty-four (24) hours per day, exercise was only allowed indoors, solitary confinement was indefinite and reviews occurred "just annually"); *Brown*, 751 F.3d at 988.

a. Protected Liberty Interest

Weddle has no federally created liberty interest in avoiding the term of confinement in disciplinary segregation, for this falls within the scope of punishment ordinarily contemplated by a sentence. *See Sandin*, 515 U.S. at 478, 485-86; *Chappell*, 706 F.3d at 1063. Additionally, Weddle has no liberty interest under state law in avoiding the disciplinary sentence because Weddle's term in disciplinary segregation was not an atypical hardship.

Defendants have produced evidence that establishes beyond dispute that the conditions of Weddle's segregation were not atypical and significant. In general population units at LCC, inmates are housed together; may shower at least three (3) times per week; freely walk in the yard; possess personal property (subject to certain regulations); have access to common fare meals; may possess electronics such as televisions; have physical access to the law library, and send and receive mail. (ECF No. 24 at Exs. 11-13.) Inmates in segregated housing are housed separately; may only shower three (3) times per week, have access to common fare meals; are limited to one (1) non-emergency phone call to family per week; cannot access any electronics such as televisions; and may possess personal property. (*Id.* at Exs. 9, 10.) They are not allowed physical access to the law library and, instead, are required to use an inmate law library assistant. (*Id.*) Inmates in segregation receive all first class and legal mail;

and have a minimum of seven (7) hours per week outdoors. (*Id.*) Finally, they face greater limitations on possessing property and making purchases from the prison canteen. (*Id.*) In sum, the principal difference between general population and disciplinary segregation is restriction on movement and interaction with our inmates. The first *Sandin* factor, therefore, points strongly against finding atypical hardship. *Serrano*, 345 F.3d at 1078.

Additionally, the duration of Weddle's disciplinary sentence fails to support a hardship finding. There is no dispute between the parties that he was only sentenced to fifteen (15) days in disciplinary segregation and did not lose any good time credits. (ECF Nos. 10, 24.) Fifteen (15) days is insufficient to constitute an atypical hardship. *See Sandin*, 515 U.S. at 486 (finding that thirty (3) days in segregation did not constitute an atypical and significant hardship); *Gorum v. Calderwood*, 2015 U.S. Dist. LEXIS 143067, 2015 WL 6438292, at n*4 (D. Nev. Oct. 21, 2015) (finding that forty-two (42) days in segregation did not constitute an atypical and significant hardship); *compare Brown*, 751 F.3d at 988 (finding that twenty-seven (27) months in segregation is an atypical and significant hardship). Further, Weddle's sentence was not extended. (ECF Nos. 10, 24.)

Weddle's opposition does not contest Defendants' evidence regarding the terms of his disciplinary segregation. (ECF No. 44.) In fact, at no time has Weddle articulated facts about the conditions of confinement that Defendants imposed upon him as discipline for his G9 charge. (ECF Nos. 10, 44.) Instead, he reiterates his allegations that there was a procedural due process during the disciplinary hearings because he was not allowed to review the video of the incident nor was he allowed to call witnesses. (ECF No. 44 at 6-8.) Weddle's contention is that he need only show a procedural violation in order to be entitled to due process rights. (*Id.*) However, a procedural violation absent a deprivation of a protected liberty is insufficient to entitle an inmate to the protections of the Due Process Clause. *Sandin*, 515 U.S. at 484. Accordingly, no

evidentiary basis exists to conclude that Weddle has a protected liberty interest that would trigger Due Process Clause protections.

b. Requirements of Due Process

Upon concluding that a protected liberty or property interest is at stake, the court then considers whether prison officials have adhered to the due process requirements. "[A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime . . ." *Wolff v. McDonnell*, 418 U.S. 539, 555, 94 .Ct. 2963, 41 L.Ed.2d 935 (1974). "However, no *Wolff*-type due process protections apply unless the result of the hearing is a punishment that impairs a constitutionally cognizable liberty interest as defined in *Sandin* . . ." *Hernandez v. Cox*, 989 F.Supp.2d 1062, 1068 (D. Nev. 2013) (citation omitted).

As detailed above, this Court has concluded that Weddle did not have a protected liberty interest because he did not suffer an atypical and significant hardship. Therefore, Weddle is not entitled to *Wolff*-type protections and this Court recommends that Defendants' partial motion for summary judgment (ECF No. 24) should be granted as it pertains to Counts II and III against Preston and Carpenter.

C. Supervisory Liability Under Section 1983 – Counts IV and V

Supervisory personnel may not be held liable under section 1983 for the actions of subordinate employees based on respondeat superior or vicarious liability. *Crowley v. Bannister*, 734 F.3d 967, 977 (9th Cir. 2013); accord *Lemire v. Cal. Dep't of Corr. & Rehab.*, 726 F>3d 1062, 1074-75 (9th Cir. 2013); *Lacey v. Maricopa Cty.*, 693 F.3d 896, 915-16 (9th Cir. 2012) (en banc). A supervisor may be liable under section 1983 only upon a showing of (1) personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. *Redman v. Cty. Of San Diego*, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc) (citation omitted), abrogated in part on other grounds by *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). "Supervisory liability exists even without overt personal participation in the offensive act if supervisory

officials implement a policy so deficient that the policy 'itself is a repudiation of constitutional rights' and is 'the moving force of the constitutional violation.'" *Redman*, 942 F.2d at 1446 (citation omitted). Thus, supervisory officials "cannot be held liable unless they themselves" violated a constitutional right. *Ashcroft v. Iqbal*, 556 U.S. 662, 676, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

Weddle fails to allege facts showing that LeGrand and Baca were personally involved in Weddle being deprived of a constitutional right. Weddle bases his claims of supervisory liability against LeGrand and Baca on their separate reviews of his disciplinary hearings, and the fact that each determined that Weddle's constitutional rights were not violated therein. (ECF No. 10 at 24-29.) Since supervisory liability requires that a constitutional violation occurred, and this Court has already determined that no such underlying violation exists, LeGrand and Baca should not be held liable for the disciplinary hearings conducted by Preston and Carpenter. Thus, this Court recommends that Defendants' partial motion for summary judgment (ECF No. 24) should be granted as it pertains to Counts IV and V against LeGrand and Baca.[1]

D. Sovereign Immunity on Negligence Claim – Count VI

Weddle argues that 28 U.S.C. § 1367 allows him to bring a state law negligence claim against Feil and Carpenter. (ECF No. 10 at 30-31.) Meanwhile, Defendants argue that the court lacks subject matter jurisdiction over Weddle's state law negligence claim is barred under NRS 41.031 and 41.0337 because he failed to name the State of Nevada and, thus, failed to invoke a waiver of the State of Nevada's sovereign immunity. (ECF No. 24 at 25-26.)

The Nevada State Legislature enacted 41.031 "to waive the immunity of governmental units and agencies from liability for injuries caused by their negligent conduct, thus putting them on equal footing with private tort-feasors." *Turner v. Staggs*, 89 Nev. 230, 510 P.2d 879 (1973); NRS 41.031. To effect this waiver, a plaintiff must

[1] The Court will not address Defendants' qualified immunity argument at this time as Counts IV and V have been decided on an independent basis.

meet certain requirements set forth in N.R.S. Chapter 41; under Nevada Revised Statute 41.0337, a plaintiff's failure to name the State of Nevada or the particular department, commission, board or other agency of the State whose actions are the basis for the suit deprives the court of subject-matter jurisdiction. NRS 41.0337(1); *Jimenez v. State*, 98 Nev. 204, 205, 644 P.2d 1023 (1982). However, N.R.S. 41.0377 applies only to "tort action[s] arising out of an act or omission within the scope of a person's public duties or employment." NRS. 41.0337(1).

Although NRS 41.031 and the provisions it references make no distinction between official capacity and personal capacity claims, section 1983 jurisprudence is instructive. Official capacity suits filed against state officials are merely an alternative way of pleading an action against the state entity of which the defendant is an officer. *Hafer v. Melo*, 502 U.S. 21, 27, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991). Individual capacity claims, on the other hand, seek to hold officials personally liable for their unconstitutional actions taken under color of state law. *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985); *see also Hafer v. Melo*, 502 U.S. 21, 30, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991) (clarifying that the Eleventh Amendment does not bar suits against state officials sued in their individual capacities).

If Weddle was bringing a state law tort claim against Defendants Feil and Carpenter in their "official capacity" such a claim would be barred because such a suit would seek to hold the State of Nevada, or NDOC, liable for the state law violations of its employees. In this case, Weddle specifically states that he is suing Feil and Carpenter in their individual capacity only. (ECF No. 10 at 2.) The Eleventh Amendment does not bar suits against state officials sued in their individual capacities, therefore neither Feil nor Carpenter are entitled to Eleventh Amendment protection in Count VI. *See Hafer*, 502 U.S. at 30. Furthermore, the same analysis applies to O'Dea whom Defendants have requested be read into Count VI, because Weddle specifically states he is suing O'Dea in his individual capacity only. (ECF no. 10 at 5.) Thus, this Court recommends

that Defendants' partial motion for summary judgment (ECF No. 24) should be denied as it pertains to Count VI against Feil, Carpenter, and O'Dea.

E. Money Damages Against Defendant Williams – Count VII

To the extent Weddle seeks to bring claims for damages against Williams in his official capacity, he may not do so. In Count VII, Weddle states that he is suing Williams in his official capacity only and that he is seeking injunctive and monetary relief. (ECF No. 10 at 31, 33.) The Eleventh Amendment prohibits suits for monetary damages against a State, its agencies, and state officials acting in their official capacities. *Aholelei v. Dep't of Public Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007); *Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1992). As such, the Eleventh Amendment bars any claim for monetary damages against Williams.

IV. CONCLUSION

Based upon the foregoing, the Court recommends that Defendants' partial motion for summary judgment be granted in part and denied in part. The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. This Report and Recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that Defendants' motion for summary judgment (ECF No. 24) be **GRANTED IN PART AND, DENIED IN PART**;

IT IS FURTHER RECOMMENDED that Count VI against Defendants Feil, Carpenter, and O'Dea, of the first amended complaint **PROCEED**; and

IT IS FURTHER RECOMMENDED that Count II against Defendant Preston; Count III against Defendant Carpenter; Count IV against Defendant LeGrand; Count V against Defendant Baca, and Count VII against Defendant Williams, be **DISMISSED**.

DATED: January 16, 2019.

UNITED STATES MAGISTRATE JUDGE